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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 250

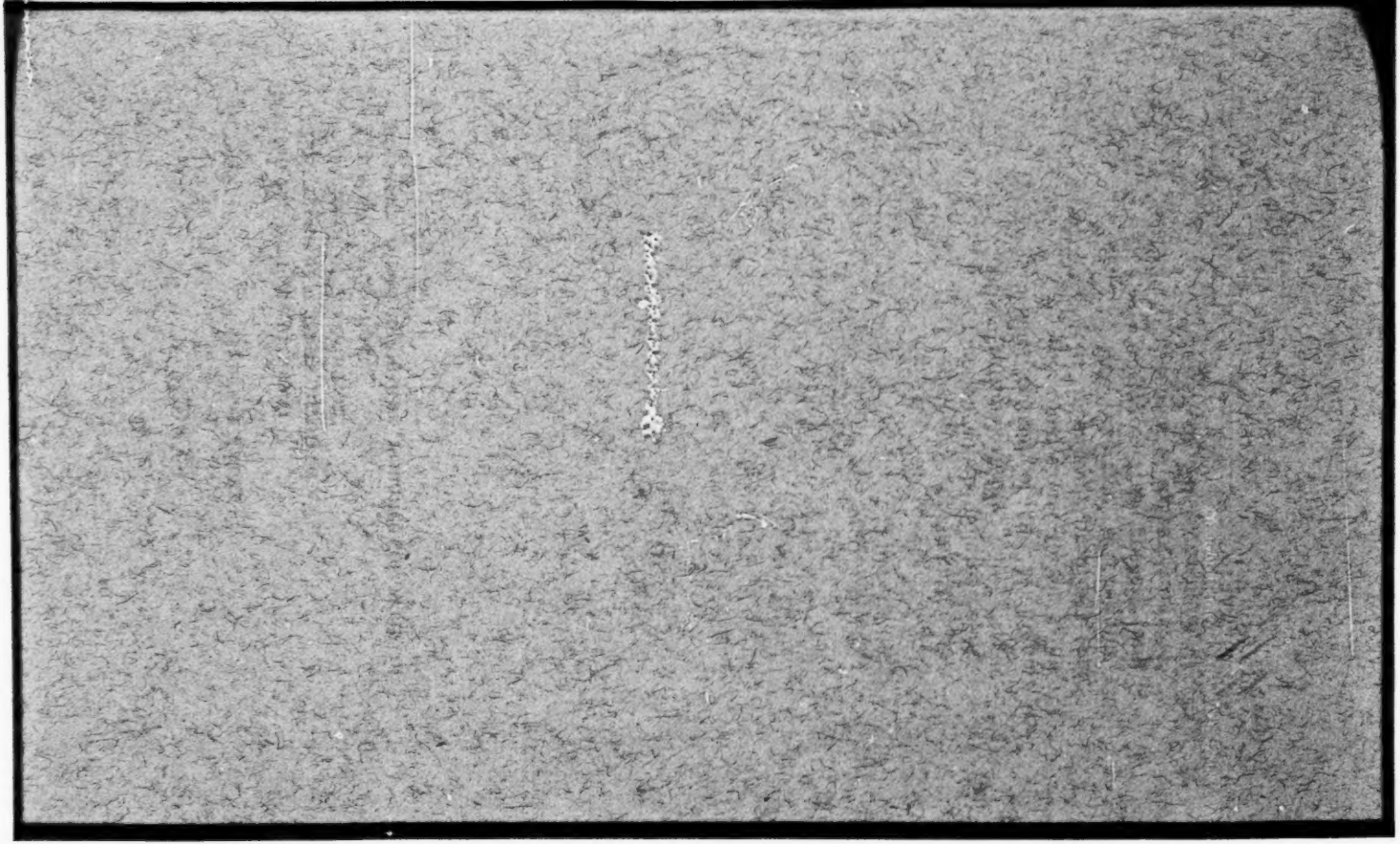
TEMPLE OF LIGHT, A MICHIGAN ECCLESIASTICAL CORPORATION, AND O. JAMES CREWS,
Petitioners,

vs.

BOSTON EDISON PROTECTIVE ASSOCIATION, A MICHIGAN CORPORATION, AND SARAH P. BURGESS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

EDWARD N. BARNARD,
Counsel for Petitioners.



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Defendants, Appellants and Petitioners,

vs.

BOSTON EDISON PROTECTIVE ASSOCIATION, A MICHIGAN CORPORATION, AND SARAH P. BURGESS,
Plaintiffs, Appellees and Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Petitioners respectfully show the court as follows:

I

Statement of Matters Involved

1. The Petitioner, Temple of Light, now is and at all times hereinafter mentioned and referred to was a Michigan Ecclesiastical Corporation, incorporated as such for the express purpose of carrying on religion for the benefit of its members and organized pursuant to a Michigan Statute per-

taining to incorporation of such religious bodies. O. James Crews, now is and at all times hereinafter mentioned and referred to was the duly constituted pastor of the said Temple of Light. Both the Temple of Light and O. James Crews were made defendants in a certain suit in Chancery bearing title as shown in the beginning of this petition. Boston-Edison Protective Association was and is a Michigan Corporation, which was organized for the purpose of enforcing building restrictions in a certain subdivision in the City of Detroit, Michigan, and Sarah P. Burgess was and is a member of the said Boston-Edison Protective Association, and a property owner in said subdivision.

The defendant below, Temple of Light, at the time the suit below was instituted, was the owner, and still is the owner of several lots located on Edison Avenue in Detroit, Michigan, on which there was and now is a large building built and designed for a residence building, and which at one time was owned by Henry Ford. The said Temple of Light was desirous of using the said property as the residence of its Pastor, O. James Crews, and also to hold and conduct on a somewhat limited scale church services involving preaching and music and prayer and the teaching of the Bible, and also explanation of astronomical facts in relation to scriptures and religion.

Said property which was and is so owned by Temple of Light, was at the time the suit below was instituted, and still is subject to certain building and use restrictions of record which likewise affected other properties in the same subdivision, purporting to restrict the use of property to residence purposes only.

The plaintiffs in the case below instituted a suit in the Circuit Court for Wayne County, Michigan, against the Temple of Light and O. James Crews, for the purpose of obtaining an injunction against the violation of the restric-

tions. Upon the trial of this case before the Honorable Robert M. Toms, Circuit Judge, at Detroit, Michigan, there were some questions of fact involved, but the court found by its decree which appears on page 97 of the printed record, that the defendants were using the property for religious purposes which the court did not regard as residence purposes and issued an injunction against violating the restrictions by such use.

The plaintiffs in the court below were not satisfied with the Decree rendered by the Circuit Judge, and appealed the case to the Supreme Court of the State of Michigan, and in that court the record was reviewed and the decree issued by the Honorable Robert M. Toms was modified and a new decree issued in the Supreme Court. A correct copy of that Decree is included immediately following the printed record used in the Supreme Court for the State of Michigan, as certified by the clerk of that court.

The Supreme Court of the State of Michigan found that the defendants, O. James Crews and Temple of Light held meetings on the property for conducting religious services, with the usual incidents of music, ritual, exhortations and collection of offerings and ordered said defendants to desist from such uses and ordered an injunction against the defendants from using or allowing the property to be used for any purpose other than single private dwelling house and from permitting the premises to be used for religious services or church purposes. The said Decree of the Michigan Supreme Court was entered on April 3, 1945.

2. In the month of January 1947, petitioners filed with the Supreme Court of the State of Michigan, a petition for leave to present to the trial court a petition for rehearing of the case and to set aside or modify the permanent injunction which had been issued, for the reason that the character of the neighborhood in which the property involved was located

had been changed, and the building restrictions were consistently and continuously being violated so that it was no longer equitable to enforce them. An answer to this petition was filed and briefs were filed, and the Supreme Court of Michigan denied the petition by an order entered without opinion on April 9, 1947, a copy of which appears in the certified record.

3. The said defendant church corporation has continued to hold and own the said property in the expectation that a decision by the Supreme Court of the United States would be forthcoming affording to churches the protection which the Constitution of the United States seems to guarantee to them from injunctive interference by the State with their religious practices. On May 3, 1948, the case of *Shelly* v. *Kraemer* and *McGhee* v. *Sipes*, 334 U. S. 1, was decided, and for the first time it was held that action by the highest court of a State in the enforcement of building restrictions by judicial decision was in effect state action which would violate the constitution of the United States. In that case building restrictions were enforced to effectuate racial discrimination, and in the opinion of petitioners this differs only slightly and not in any material respect from injunctive interference with the exercise of religion. Accordingly these petitioners presented to the Supreme Court of the State of Michigan a petition to set aside the permanent injunction issued by the said Supreme Court upon the ground that the said injunction violated the first amendment of the Constitution of the United States by prohibiting the free exercise of religion, and by abridging the rights of the defendants to freedom of speech and their rights peaceably to assemble and violated the Fifth Amendment of the Constitution in depriving the petitioners of their property without due process of law, and violated the 14th Amendment of the United States Constitution in de-

priving the defendants of their property without due process of law, and in denying to them the equal protection of the laws. A copy of the said petition is included in the certified record, and is hereby referred to. The said petition was answered and the answer appears in the certified record; briefs were filed by both sides, and although an oral argument was requested by these petitioners on the ground that the petition involved constitutional questions, and the court rules permit oral arguments in the Supreme Court upon such questions, an oral argument was not granted, and the court entered an order without opinion denying the said petition, the said order being entered on May 18, 1950, a copy of which is included in the certified record.

4. That as shown by Paragraph 10, pages 8 and 9 of petitioners' petition to the Supreme Court of Michigan, and as admitted and set forth in plaintiffs' answer to said petition on pages 4 and 5 thereof, and in the copy of plaintiffs' petition to punish defendants for contempt which is attached to the said answer, the defendants are seeking to enforce the Decree and injunction of the Supreme Court of Michigan against these petitioners and to prevent petitioners from exercising religion, contrary to the rights of petitioners and to the petitioners' irreparable injury. The said petition and order to show cause for contempt have not yet been decided but are being held in abeyance temporarily, but are still pending.

II

Statement of Jurisdiction

1. The petitioners claim that the Supreme Court of the United States has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review the order of the said court entered on May 18, 1950, denying

the petition of these petitioners to set aside the injunction issued by the said State Supreme Court of Michigan upon constitutional grounds under the provisions of the Act of Congress of June 25, 1948. Chapter 646, 62 Statutes 929, being section 1257 of Title 28, of United States Code Annotated which reads in part as follows:

> Sec. 1257. "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*

III

Questions Presented

The questions presented by this petition for Writ of Certiorari are as follows:

1. Does not the order of the Supreme Court of the State of Michigan entered on May 18, 1950, denying the petitioners' prayer to set aside the permanent injunction issued against the petitioners by the said court:

(a) Erroneously refuse to set aside a permanent injunction when it was shown that the said injunction works irreparable injury to these petitioners in violation of the rights guaranteed to petitioners by the Constitution of the United States and the recent pronouncement of the Supreme

Court of the United States, and when it was no longer equitable to continue the same?

(b) Violate the First amendment of the Constitution of the United States by prohibiting the free exercise of religion, and by abridging the freedom of speech and by abridging the rights of the petitioners and the members of the church, Temple of Light, peaceably to assemble?

(c) Violate the fundamental rights of petitioners under the First Amendment to the Constitution of the United States and deprive petitioners of their property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and deprive them of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States?

(d) Erroneously refuse to recognize that a Decree of the highest court of the State enforcing building and use restrictions by injunction may be final action of the State violating the constitutional rights of these petitioners contrary to the supreme law of the land the same as though the State Legislature had taken legislative action in violation of the United States Constitution?

(e) Refuse to recognize, in violation of the well settled constitutional law of the nation that the fundamental rights guaranteed by the First Amendment to the Constitution of the United States are binding upon the State as well as upon Congress?

IV

Reasons Relied Upon for Issuance of Writ of Certiorari

The petitioners rely upon the following reasons as to why this court should issue its writ of certiorari:

(a) The Supreme Court of the State of Michigan has decided a federal question not heretofore decided by this court. In the case of *McGhee* v. *Sipes*, 334 U. S. 1, the Supreme Court for the first time held that the final decree of a state court enjoining the violation of building and use restrictions was final state action which could be violative of the constitution of the United States. The state court's decree was regarded as violating the United States Constitution in that case upon the ground of racial discrimination. This case involves the different question of prohibiting the free exercise of religion, abridging freedom of speech, and the right of the people peacefully to assemble in violation of the fundamental rights guaranteed by the First Amendment to the Constitution of the United States and made binding upon the state by the Fourteenth Amendment. The questions involved in our case have not been decided by the Supreme Court of the United States. No case has been found heretofore decided by the United States Supreme Court where a state court had enjoined the free exercise of religion in the enforcement of building restrictions.

(b) The rights of religious worshippers throughout the United States are the concern of large numbers of the people of this country. The rights of churches to hold and use property for religious purposes without interference by state court injunctions because of property restrictions are very far reaching in importance. The Order of the Supreme Court of the State of Michigan in this case appears to petitioners to be contrary to the decisions of the Supreme

Court of the United States as it has expressed itself in the case of *McGhee* v. *Sipes*, 334 U. S. 1. If allowed to stand the order of the Michigan Supreme Court would result in irreparable injury to the petitioners.

WHEREFORE, these petitioners respectfully pray that a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Michigan, to review the decision of that court of May 19th, 1950, denying petition of the petitioners herein to set aside the permanent injunction issued by the said court.

TEMPLE OF LIGHT,
a Michigan Ecclesiastical Corporation,
By WM. NOSWORTHY,
Its Vice President,
O. JAMES CREWS,
Petitioners.

EDWARD N. BARNARD,
Attorney for Petitioners,
905-11 Dime Building,
Detroit 26, Michigan.

Woodward 1-3036.

STATE OF MICHIGAN,
County of Wayne, ss:

Before me a Notary Public in and for the County of Wayne and State of Michigan, on this 29th day of July, 1950, personally appeared William H. Nosworthy, to me known to be the Vice-President of Temple of Light, a Michigan Ecclesiastical Corporation, and being duly sworn did depose and say that he signed the foregoing petition on behalf of said corporation, and was duly authorized to do so by its Board of Trustees, and O. James Crews, being also

known to me and being duly sworn together with the said William H. Nosworthy, did each depose and say that the foregoing Petition by them subscribed is true of their own knowledge, except as to matters therein stated to be upon information and belief, and as to those matters they do believe the same to be true.

AGNES SECOR,
Notary Public,
Wayne County, Michigan.

[SEAL.]

My Commission Expires: January 8, 1954.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 250

TEMPLE OF LIGHT, A MICHIGAN ECCLESIASTICAL CORPORATION, AND O. JAMES CREWS,
Defendants, Appellants and Petitioners,

vs.

BOSTON EDISON PROTECTIVE ASSOCIATION, A MICHIGAN CORPORATION, AND SARAH P. BURGESS,
Plaintiffs, Appellees and Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement of Questions Involved

1. Does not the order of the Supreme Court of the State of Michigan entered on May 18, 1950, denying the defendants' petition to set aside the permanent injunction issued against them by the said court erroneously refuse to set aside a permanent injunction when it was shown that the said injunction works irreparable injury to these petitioners in violation of their rights guaranteed to them by the Constitution of the United States, and when it was no longer equitable to continue the said injunction?

2. Does not the said order of the Supreme Court of the State of Michigan entered on May 18, 1950, violate the First Amendment to the Constitution of the United States by prohibiting the free exercise of religion, and by abridging the freedom of speech and by abridging the rights of petitioners and of the members of the church, Temple of Light, to peaceably assemble?

3. Does not the said order of the Supreme Court of the State of Michigan entered on May 18th, 1950, violate the fundamental rights of the petitioners under the First Amendment to the Constitution of the United States, and in so doing deprive the petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and deprive them of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Does not the said order of the Supreme Court of the State of Michigan entered on May 18th, 1950, erroneously refuse to recognize that a decree of the highest court of the state enforcing building and use restrictions by injunction may be final action of the state violating the constitutional rights of these petitioners contrary to the supreme law of the land, the same as though the State Legislature had taken Legislative action in violation of the United States Constitution?

5. Does not the said order of the Supreme Court of the State of Michigan entered on May 18th, 1950, refuse to recognize in violation of the well settled constitutional law of the nation, that the fundamental rights guaranteed by the First Amendment to the Constitution of the United States are binding upon the State as well as upon Congress?

I

Statement of Facts

As shown by the Decree which was entered in the Supreme Court of the State of Michigan on April 3rd, 1945, and a part of the certified record, the Temple of Light, one of the defendants, at that time had been and then was a Michigan Ecclesiastical Corporation, incorporated for the express purpose of carrying on religion pursuant to a Michigan Statute pertaining to the incorporation of such religious body, and the defendant, O. James Crews then was the duly constituted Pastor of the said Temple of Light. As shown by the defendants' petition made to the Supreme Court of the State of Michigan to set aside the temporary injunction provided for in the said decree, the said Temple of Light and the said O. James Crews are still engaged in religious activities. The Temple of Light at the time the case was tried in the Circuit Court for Wayne County, Michigan, and at the time the decree was entered by the Supreme Court and continuing to the present time, was and still is the owner of several lots located on Edison Avenue in the city of Detroit, Michigan. The Supreme Court of the State of Michigan found that the defendants were engaged in holding meetings on the said property for conducting religious services with the usual incidents of music, rituals, exhortations, prayers, and the collection of offerings, the said decree being entered in the Supreme Court of the State of Michigan on April 3, 1945, and by which the said court ordered an injunction against the defendants from using or allowing the property to be used for any purpose other than a single private dwelling house, and from permitting the premises to be used for religious services or church purposes. As shown by the said decree which is included in the certified record, the only reason advanced by the

Supreme Court of the State of Michigan, for issuing its said injunction was that the property owned by the said Temple of Light, a Michigan Ecclesiastical Corporation, was subject to building and use restrictions, subjecting the property "to the reciprocal negative easement" that "nothing but a single private residence and the necessary out-buildings shall be located thereon". (Paragraph 1 of Decree.)

The trial judge, the Honorable Robert M. Toms, Circuit Judge, at Detroit, Michigan, in the decree entered by him, as found on page 138 of the printed record of the Michigan Supreme Court, has found by said Decree that the defendants were using the property for religious purposes.

The plaintiffs were not satisfied with the injunctive relief given them by the trial judge and appealed the case to the Supreme Court of Michigan, where in that court a modied decree was entered, so that the injunction which was finally issued became in effect and in fact the injunction of the Supreme Court of the State of Michigan (Michigan Supreme Court's Decree dated April 3, 1945).

In the month of January 1945, the petitioners filed with the Supreme Court of the State of Michigan, their petition for leave to present to the trial court a petition for rehearing of the case and to set aside or modify the permanent injunction which had been issued, for the reason that the character of the neighborhood in which the property involved was located had been changed, and the building restrictions were consistently and continually being violated so that it was no longer equitable to enforce them. (Petition for leave to file petition for rehearing in the trial court filed with Michigan Supreme Court on January 30, 1947.) An answer to this petition was filed and briefs were filed and the Supreme Court of Michigan denied the petition by an order entered without opinion, on April 9, 1947 a copy of which appears in the certified record. The corporation

has continued to hold and own the said property with the expectation that a decision would be handed down by the United States Supreme Court protecting churches from injunctive interference by state courts, and really enforcing in favor of churches the guarantees of the United States Constitution against prohibiting the free exercise of religion.

The petitioners knew about the case of *Shelly* v. *Kraemer,* and *McGhee* v. *Sipes,* which was pending in the United States Supreme Court. After that case was decided, petitioners filed with the Supreme Court of the State of Michigan on April 27, 1950, their petition to set aside the injunction which had been issued by the Supreme Court. This petition relied upon the case of *Shelly* v. *Kraemer* and *McGhee* v. *Sipes,* 334 U. S. 1, as changing the law and holding for the first time that a final decree affirmed by the highest court of the State enforcing building and use retrictions should be regarded as state action in violation of the United States Constitution, if it was issued for reasons prohibited by the said Constitution. As shown by the said petition these petitioners relied upon the claims that the injunction issued by the Michigan Supreme Court violated the First Amendment to the Constitution of the United States by prohibiting the free exercise of religion and by abridging the rights of these petitioners to freedom of speech and their right peaceably to assemble, and since the said injunction did deprive petitioners of their fundamental constitutional rights as embodied in the First Amendment to the Constitution, it also violated the Fourteenth Amendment to the United States Constitution in depriving the defendants of their property without due process of law. It also violated the Fifth Amendment to the Constitution in depriving the petitioners of their property without due process of law.

The said petition was answered by the plaintiffs and briefs were filed, and although an oral argument was requested the Supreme Court of Michigan declined to hear oral arguments, and on May 18th, 1950, entered an order denying the said petition. (See order of Supreme Court entered on May 18th, 1950, in certified record.)

As shown by paragraph 10, on pages 8 and 9 of petitioners' latest petition to the Supreme Court of Michigan, and as admitted and set forth in plaintiffs' answer to said petition on pages 4 and 5 thereof, and in the copy of the plaintiffs' petition to punish the defendants for contempt which is attached to the plaintiffs' said answer, the plaintiffs are seeking to enforce the Decree and injunction of the Supreme Court of Michigan against petitioners by prosecuting contempt proceedings and to prevent petitioners from exercising religion. The said petition and order to show cause for contempt have not been heard and decided and are still pending and constitute a grave threat against petitioners to prevent them from exercising religious freedom and seek to punish petitioners if they are at any time found to be exercising religious freedom, or free speech or freedom of assembly on the property in question, and show that the plaintiffs are determined to enforce the said injunction against petitioners, and that petitioners are threatened with irreparable injury unless the injunction issued by the Supreme Court of the State of Michigan is set aside. These petitioners have definitely and emphatically presented to the Supreme Court of the State of Michigan each of the views contended for in their petition for Writ of Certiorari and involving the contention of these petitioners that the final Decree of the Supreme Court of the State of Michigan violate the constitutional rights of these petitioners, and the said Supreme Court of the State of Michigan has squarely passed upon these contentions and denied relief to these petitioners and

have left no recourse for the petitioners except to apply to the Supreme Court of the United States.

II

Statement of Jurisdiction

1. The petitioners claim that the Supreme Court of the United States has jurisdiction to issue its Writ of Certiorari to the Supreme Court of the State of Michigan, to review the order of the said court entered on May 18, 1950, denying the petition of these petitioners to set aside the injunction issued by the said State Supreme Court of Michigan upon constitutional grounds under the provisions of the Act of Congress of June 25, 1948, Chapter 646, 62 Statutes 929, being Section 1257 of Title 28, of United States Code Annotated which reads in part as follows:

> Sec. 1257. "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be revised by the Supreme Court as follows:
>
> * * * * * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.*"

III

Summary of Argument

A. The Injunctive Decree Issued and Continued in Force Against Petitioners by the Supreme Court of the State of Michigan, Should Be Set Aside for the Following Reasons:

1. Even a final injunction looks to the future and when it is shown that the said injunction violates the fundamental laws of the land and cannot equitably be continued in force, the same should be set aside.

2. The Supreme Court of the United States has now definitely decided that a decree which has been affirmed by the Supreme Court of a state enjoining the violation of building and use restrictions should be regarded as action by the state in violation of constitutional rights if it does in effect violate such rights even though the constitutional rights involved in that decision relate solely to racial discrimination, the rule of that decision should also be applied to violation of the fundamental rights guaranteed by the First Amendment to the Constitution.

3. The final decree of the Supreme Court of Michigan and the refusal of that court to set the same aside prohibits the free exercise of religion by the petitioners and abridges the rights of free speech and the right peaceably to assemble on the part of petitioners, and the members of the petitioners' church in violation of the terms of the First Amendment to the Constitution of the United States.

4. Even though the first amendment to the Constitution of the United States in express terms amounts only to a prohibition against Congress, the rights guaranteed by the said Amendment are so fundamental, that their violation by

Act of the State amounts to a denial of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution, and a denial of the equal protection of the laws, even though the procedural requirements of due process of law have been complied with.

IV

Argument

A. The Injunctive Decree Issued and Continued in Force Against the Petitioners by the Supreme Court of the State of Michigan Should Be Set Aside.

1. Even though the decree which was entered on April 3rd, 1945, in the Supreme Court of the State of Michigan had become final in the sense that the time for appeal had elapsed, still this Decree provided for a permanent injunction and it is the law that such an injunction looks to the future and assumes that the conditions which at the time appeared to justify its issuance would continue, and when it appears that such an injunction violates the fundamental laws of the land and cannot equitably be continued in force any longer the same should be set aside.

The Supreme Court of the State of Michigan has held that injunctions, "operate in in futuro and no vested right exists therein as they may be modified or dissolved later".

Grocer Co. v. *Local No. 406* (A. F. L.), 321 Mich. 276, 291;

Smith v. *Lynch,* 233 Mich. 6;

Misch v. *Lehman,* 178 Mich. 225.

The rule in relation to the "power to modify permanent injunctions" is clearly stated in 68 A. L. R. 1180, as follows:

> *"The cases seem to be uniform in holding that the court which rendered a decree for a permanent or per-*

petual injunction may open or modify the same where the circumstances and situation of the parties are shown to have so changed as to make it just and equitable to do so."

Citing the Michigan case of *Misch* v. *Lehman,* 178 Mich. 225, and cases from Illinois, Kansas, Maryland, Minnesota, Nebraska, Pennsylvania, Texas and Wisconsin.

This proposition is further supported by an annotation in 136 A. L. R. 765, and is substantiated by the following citations:

Ladner v. *Siegel,* 298 Pa. 487; 68 A. L. R. 1172;
United States v. *Swift & Co.,* 286 U. S. 106, 114; 76 L. Ed. 999;
28 Amer. Juris Prudence Injunctions, paragraph 323, pages 494, 495;
Cocola Co. v. *Standard Bottling Co.,* 138 Fed. (2d) 788;
Fleming v. *Miller,* 47 Fed. (2d) 1004;
Jackson Grain Co. v. *Lee, Florida,* 7 So. (2d) 143, 146;
Santa Rita Ore & Gas Co. v. *State Board of Equalization,* 114 Pac. (2d) 521, 522;
Ex parte Stewart Meyers, Alabama, 21 So. (2d) 113, 115;
Florsheim Shoe Store Co. v. *Retail Shoe Salesmen Union,* 47 N. Y. Supp. (2d) 772, 779;
Gregory v. *Grain, Kentucky,* 163 S. W. (2d) 289, 291;
Enterprise Window Cleaning Co. Inc., et al., v. *Slowuta,* 73 N. Y. Supp. (2d) 376;
International Railway Co. v. *Davidson,* 66 Fed. Supp. 58, 60.

The petitioners contend that it is now clear that the final decree of the Supreme Court of the State of Michigan enforcing building and use restrictions against the petitioners constitutes action by the state in violation of the

constitutional rights of petitioners to be free from interference with their free exercise of religion, free speech and freedom of assembly and is no longer warranted and should now be set aside.

2. The Supreme Court of the United States has now definitely decided that a Decree entered and affirmed by the Supreme Court of the State enjoining the violation of building and use restrictions should be regarded as action by the State in violation of constitutional rights if it does in effect violate such rights, in a case involving racial discrimination, and the same rule should be followed if the state action violates the national constitution in other fundamental respects even though not involving racial discrimination.

In the recent case decided by the Supreme Court of the United States on May 1st, 1948, *Shelly et ux.* v. *Kraemer et ux.*, together with *McGhee* v. *Sipes, et al.*, 334 U. S. 1, it was definitely held that injunctions which had theretofore been continued in force by the Supreme Courts of two states enjoining the violation of restrictive covenants affecting the use of property, was action by the states which should be held unconstitutional where it had the effect of effectuating racial discrimination.

The Supreme Court pointed out that the decision was a new one on a new point not theretofore decided and said on page 8:

> "Whether the equal protection clause of the 14th Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this court has not heretofore been called upon to consider."

The Supreme Court said further in the said case:

> *"We have no doubt that there has been state action in these cases in the full and complete sense of the*

phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

"These are not cases, as has been suggested, in which the states have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

"*The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common law policy of the states as formulated by those courts in earlier decisions. In the Missouri* enforcement of the covenant was directed in the first instance by the highest court of the state after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakeable imprimatur of the state. We have noted that previous decisions of this court have established the proposition that judicial action is not immunized from the operation of the 14th amendment simply because it is taken pursuant to the state's common-law policy.

Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the 14th Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the 14th amendment, it is the obligation of this court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the 14th Amendment. That such discrimination has occurred in these cases is clear."

Shelley, et ux. v. *Kraemer, et ux.*, and
McGhee et ux. v. *Sipes, et al.*, 334 U. S. 1 (8, 17-20).

We submit that the free exercise of religion, freedom of speech, and freedom peaceably to assemble guaranteed to the people by the First Amendment to the Constitution of the United States are regarded in the law as essential and fundamental constitutional rights of an equally high order or of a higher order than the right to be free from racial discrimination, and where a final decree of the State Court denies or abridges the said fundamental freedoms of the First Amendment to the Constitution it should equally be regarded as state action which should not be tolerated.

The action taken in our case was by an injunctive decree prohibiting the violation of building and use restrictions, which is exactly the same action as was taken in the foregoing Supreme Court case.

3. The refusal of the Supreme Court of the State of Michigan to grant the petitioners' last petition to set aside

its Decree enjoining the petitioners from using their property on Edison Avenue in Detroit, Michigan, for religious purposes prohibits the free exercise of religion by the petitioners and abridges the rights of free speech and the right peaceably to assemble on the part of petitioners and the members of petitioners' church in violation of the terms of the First Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States reads as follows:

"ARTICLE I

"Religious freedom; freedom of speech and press; right to peaceably assemble and petition. *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,* or of the press; *or the right of the people peaceably to assemble,* and to petition the Government for a redress of grievances."

As heretofore pointed out the final decree entered in the Supreme Court of the State of Michigan, expressly adjudges that the petitioners herein were engaged in holding church services and carrying on religious activities and these were the things which the court regarded as in violation of the restrictions, together with the practice of astrology. Surely holding church services, preaching, exhortations, prayers and taking collections involve the free exercise of religion. Surely conducting church services, preaching and announcing meetings and reading prayers, involve freedom of speech as well as the exercise of religion. Surely the congregating of people together to engage in such church services, listening to sermons, and carrying on prayer meetings, involve the right of church members "peaceably to assemble".

In *Pierce* v. *Society of Sisters of the Holy Name,* 268 U. S. 510, 69 Law. Ed. 1070, the Supreme Court of the United States upheld an injunction against the enforcement of a law of the State of Oregon requiring all children to attend public schools and which would deprive the Society of Sisters of the Holy Name of the privilege of teaching children on the school property maintained by the said Society.

In *West Virginia State Board of Education* v. *Burnette,* 319 U. S. 624-671, 87 Law Ed. 1628, the Supreme Court of the United States held void and unenforceable a Statute requiring School children to salute the flag and which provided that upon failure or refusal to observe the regulation such children would be regarded as guilty of insubordination and dealt with by expulsion and refused re-admission until compliance. In that case it was part of the religion of the Jehovah's Witnesses not to salute the flag which members of said organization regarded as a "graven image." The court held that since the members of the said religious organization held to that belief they could not be punished for practicing their religious doctrine. The Supreme Court said:

> "The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it."

The court said on page 1638 of 87 L. Ed.:

> "Much of the vagueness of the due process clause disappears when the specific prohibitions of the first become its standard. The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a Legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the 14th Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.*"
>
> *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624-671; 87 Law Ed. 1628 (1633, 1638).

In *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 Law Ed. 1213, three Jehovah's Witnesses were convicted of soliciting funds for alleged religious and charitable or philanthropic purposes without obtaining a license to do so as required by the Statute of the State of Connecticut. They were shown to have been going from house to house with a phonograph which played records describing certain pamphlets and selling or distributing the pamphlets upon religious subjects for money. The convictions were reversed for the reason that the Connecticut Statute was in violation of the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court said beginning on page 1217 of 84 Law Ed.

> "First. We hold that the Statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of

liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The *First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the Legislatures of the States as incompetent as Congress to enact such laws. The Constitutional inhibition of Legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—Freedom to believe and freedom to act.''*

Cantwell v. *Connecticut,* 310 U. S. 296, 84 Law Ed. 1213 (1217).

See also:

Taylor v. *Mississippi,* 319 U. S. 583, 87 L. Ed. 1600;
Murdock v. *Pennsylvania,* 319 U. S. 105, 87 Law Ed. 1292, 1296.

It appears from the decree entered by the Supreme Court of the State of Michigan (Decree dated April 3, 1945) that the court attached some significance to the fact that the defendant, O. James Crews lectured on Astrology, or practiced Astrology. As shown by the Canons and Laws of the church, Temple of Light, which are attached to defendants' Petition to set aside the Decree and injunction issued by the Supreme Court of the State of Michigan filed April 27th, 1950, the Canons of the church announce a belief that there is a significance in connection with the relations and positions of the heavenly bodies as bearing upon the affairs of mankind, and the defendants sincerely assert that there is authority for their belief and disbelief in the Bible. Sec-

tion V of the Canons and Laws of the Church reads as follows:

> "V. That all things of the Universe are interrelated and represent a Master Plan of God, to which man must conform and that the stars and planets in their courses, and the entire zodiac have and exert influence from God in the daily affairs of mankind, to the betterment of his life and the promotion of peace on earth, through understanding of these truths."

As an instance of this among others they cite 31, 32, and 33 of the 38th Chapter of Job, verses 3 and 4 of the 8th Psalm and verses 1, 2, and 3 of the 19th Psalm, which read as follows:

> "31. Canst thou bind the sweet influences of Pleiades, or loose the bands of Orion?
> "32. Canst thou bring forth Mazzaroth in his season? or canst thou guide Arcturus with his sons?
> "33. Knowest thou the ordinances of heaven? Canst thou set the dominion thereof in the earth?"
>
> *Job 38:31, 32, and 33.*

> "3. When I consider thy heavens, the work of fingers, the moon and the stars, which thou hast ordained:
> "4. What is man, that thou are mindful of him? and the son of man, that thou visitest him?"
>
> *Psalm 8:3, 4.*

> "1. The heavens declare the glory of god; and the firmament showeth his handywork.
> "2. Day unto day uttereth speech, and might unto night showeth knowledge.
> "3. There is no speech nor language, where their voice is not heard."
>
> *Psalm 19:1, 2, 3.*

It is respectfully submitted that a belief in the significance of the arrangement of the heavenly body based upon biblical

authorities is just as reasonable in connection with religious beliefs and teachings as the doctrines which have been recognized by the Supreme Court as good faith religious observances by Jehovah's Witnesses which may be regarded by some as divergent from patriotic views in connection with the flag of the United States.

4. Even though the First Amendment to the Constitution of the United States by its express terms amounts only to a prohibition against acts of Congress, still the rights guaranteed by the said Amendment are so fundamental that prohibiting the free exercise thereof, or abridging such rights by acts of the State amount to a denial of due process of law in violation of the Fifth and Fourteenth Amendments to the said Constitution, and a denial of the equal protection of the laws in violation of the said Fourteenth Amendment, even though the procedural requirements of due process of law have been complied with.

The Fifth Amendment to the Constitution of the United States reads in part as follows:

> "*No person shall* * * * *be deprived of life, liberty, or property, without due process of law* * * *."

The first section of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

In *Thornhill* v. *State of Alabama*, 310 U. S. 88, 64 Law Ed. 1093, there was involved the validity of a statute of the

State of Alabama making it an offense to loiter or picket about a place of business. The conviction of Thornhill under this Statute was set aside upon the ground that the statute itself was unconstitutional, because of abridging freedom of speech. The statute, of course, was not an Act of Congress, but was a state enactment, and the Supreme Court held that the First Amendment to the Constitution was binding upon the State. The court said on page 1098 of 84 Law Edition:

> "*First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.*"
>
> *Thornhill v. State of Alabama,* 84 Law Ed. 1093 (1098).

In *Thomas* v. *Collins,* 323 U. S. 516, 89 Law Ed. 430, the Supreme Court of the United States held invalid because unconstitutional an ordinance requiring anyone soliciting workers to join a union to obtain a license upon the ground that said ordinance was an unconstitutional abridgment of the right of freedom of speech and the freedom of assembly, and the court said on page 440 of 89 Law Ed.:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, of DeJonge v. Oregon, 299 U. S. 353, 364, 81 L. Ed. 278, 283, 57 S. Ct. 255, and therefore are united in the First Article's Assurance. Cf. 1. Annals of Congress 759, 760.
>
> "This conjunction of liberties is not peculiar to religious activity and institutions alone. The first

Amendment gives freedom of mind the same security as freedom of conscience. Cf. Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 ALR 468; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 ALR 1446; Prince v. Massachusetts, 321 U. S. 158, 88 L. Ed. 645, 64 S. Ct. 438. Great Secular causes, with small ones, are guarded. The grievances for redress of which the right of petition are insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430 (440).

In *Palko* v. *Connecticut,* 302 U. S. 319, 82 Law Ed. 288 the Supreme Court said on page 291 of 82 Law Ed. as follows:

"On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a State to abridge by its Statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress (DeJonge v. Oregon, 299 U. S. 353, 364, 81 L. Ed. 278, 283, 57 S. Ct. 255; Herndon v. Lowry, 301 U. S. 242, 259, 81 L. Ed. 1066, 1076, 57 S. Ct. 732) or the like freedom of the press (Grosjean v. American Press Co., 297 U. S. 235, 80 L. Ed. 660, 56 S. Ct. 444; Near v. Minnesota, 283 U. S. 697, 707, 75 L. Ed. 1357; 1362, 51 S. Ct. 625), *or the free exercise of religion* (*Hamilton v. University of California,* 293 U. S. 245, 262 79 L. Ed. 343, 352, 55 S. Ct. 197, *cf. Grosjean v. American Press Co.,* 297 U. S. 233, 80 L. Ed. 660, 56 Sup. Ct. 444, *supra; Pierce v. Society of Sisters,* 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468, *or the right of peaceable assembly, without which speech would be unduly trammeled* (*DeJonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255, *Supra*). *Herndon v. Lowry,* 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732 (supra), or the right of one accused of crime to the benefit of counsel (Powell

v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A.L.R. 527). *In these and other situations immunities that are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.*"

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288 (291-292).

See also: *Cantwell v. Connecticut,* 319 U. S. 296, 84 Law Ed. 1213;

West Virginia State Board of Education v. Barnette, 319 U. S. 624-671, 87 L. Ed. 1628).

Murdock v. Pennsylvania, 319 U. S. 105; 57 Law. Ed. 1292.

It is now well settled by decisions of the United States Supreme Court that corporations such as the Temple of Light, a Michigan Ecclesiastical Corporation, in our case, are entitled to the protection and safeguards of the First Amendment to the Constitution by reason of the Fourteenth Amendment to the Constitution. Corporations are held to be "persons" with the same legal force as natural persons so far as the benefits of the Fourteenth Amendment are concerned.

In *Grosjean* v. *American Press Company,* 297 U. S. 233, 80 Law Ed. 660, the court said:

"1. The first point represents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech or of the press. . . .' *While this provision is not a restraint upon the powers of the states, the states are precluded from abridging*

the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

* * * * * * *

"Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, as we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. *But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here.* Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 565, 17 S. Ct. 198; Smyth v. Ames, 169 U. S. 466, 522, 42 L. Ed. 819, 840, 18 S. Ct. 418."

Grosjean v. *American Press Company,* 297 U. S. 233, 80 L. Ed. 660 (665-6).

In *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 578, 592, 41 L. Ed. 560, 565, the court said:

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. Santa Clara County v. Southern P. J. Co., 118 U. S. 394 (30-118); Pembina Consol. S. Min. Co. v. Pennsylvania, 125 U. S. 181, 189 (31-650), 653, 2 Inters. Com. Rep. 24); Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29 (32-596); Charlotte C. & A. R. Co. v. Gibbes, 142 U. S. 386, 391 (35-1051, 1053)."

Covington & L. Turnpike Road Co. v. *Sandford,* 164 U. S. 578, 592, 41 L. Ed. 560 (565).

See also:

Smyth v. *Ames,* 169 U. S. 466, 42 Law Ed. 819, 840;
Liggett Co. v. *Baldridge,* 278 U. S. 105, 73 Law Ed. 204.

V

Reasons Relied Upon for Issuance of the Writ of Certiorari

The petitioners recognize that a review by Writ of Certiorari is not a matter of strict right, but of sound judicial discretion. The petitioners are very confident, however, that there are special and important reasons for the Supreme Court to entertain their petition and to issue the Writ. The petitioners feel that their application has special and substantial merit. They contend that there are no greater or more important fundamental rights in this country than those for which they seek protection. Religious rights and privileges have always been matters of great concern throughout the history of this country.

The petitioners believe that they have shown that the Supreme Court of the State of Michigan has decided a Federal question of substance not theretofore determined by the Supreme Court.. The United States Supreme Court has decided that a final decree of the highest court of a state issuing a permanent injunction to enforce agreements for restrictions upon the use of property was state action in violation of constitutional rights when it effectuated racial discrimination. The United States Supreme Court has not as yet taken the additional step of holding unconstitutional a state court's interference with the exercise of religion, free speech, freedom of assembly, or of the press as occurred in our case. However, the previous decisions of the United States Supreme Court indicate that the Supreme Court of the State of Michigan has decided the question in a manner which is probably contrary to the applicable decisions of the United States Supreme Court.

VI

Relief Sought

We ask that a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Michigan, requiring a review of the decision of that court on May 18, 1950 denying the defendants' petition that the Supreme Court set aside the State Court's decree and injunction.

Respectfully submitted,

EDWARD N. BARNARD,
Attorney for Defendants,
Appellants and Petitioners.

Dated: July 29, 1950.

Office-Supreme Court, U.S.
FILED
OCT 11 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 250

TEMPLE OF LIGHT, a Michigan Ecclesiastical Corporation, and O. JAMES CREWS,

Petitioners,

vs.

BOSTON-EDISON PROTECTIVE ASSOCIATION, a Michigan Corporation, and SARAH P. BURGESS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Defendants, Appellants and Petitioners,
vs.
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Plaintiffs, Appellees and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONCISE STATEMENT OF CASE

A complete understanding of the case requires that Petitioners' statement be supplemented as follows:

The church services of the Temple of Light are devoted both to spiritual matters and to astrology (78, 83). The

pastor, defendant O. James Crews, who founded the church, engages in the activity of casting horoscopes, and he estimated that up to the date of trial he had read the horoscopes of about twelve hundred (1200) persons at the restricted premises (69). These readings are astrological in nature and concern the foretelling of future events (68). They involve the preparation of charts based upon some calculations concerning birth dates, the latitude and longitude of the earth and the position of the planets (67-68). Advice was given on everything including stock market indications (74). While members of the church were not charged for these services, non-members were asked to donate to the building fund, and these "donations" have usually ranged between $5.00 and $150.00 (69). Mr. Crews holds himself out as the "Messenger of Light" (66-67) and the "Voice of Knowledge" (59). Prior to the decree, any member of the public was permitted and invited to frequent the premises for a horoscope reading (70-71). Appointments for these readings were arranged by Mr. Crew's secretary who was in daily attendance at the premises (85). Further details as to the origin and nature of the Temple of Light and the activities of the church and its pastor, Mr. Crews, may be found in the opinion of the trial court (91) and in the opinion of the Supreme Court of Michigan (105). Prior to forming the Temple of Light, Mr. Crews had been head of an advisory league, which, according to his testimony, was brought to an end on April Fool's Day, 1931 for practicing law illegally (57).

From the commencement of this suit in the trial court on November 26, 1941 (R. 1) until the entry of the decree of the Supreme Court of Michigan on April 3, 1945 (R. 108) the Petitioners did not at any time contend that there was a constitutional issue involved. They did not then apply to this court for review of the decree of the Supreme

Court of Michigan. On January 29, 1947 (and not 1945 as erroneously stated on page 14 of Petitioners' brief) the Petitioners petitioned the Supreme Court of Michigan to grant a rehearing of the case, claiming among other things that the decree deprived them of the federal constitutional rights which they here assert (R. 111, 117). On April 9, 1947, the Supreme Court of Michigan entered an order denying that petition (R. 165). Again Petitioners did not seek review by this court. On October 29, 1949, Petitioners took matters in their own hands and deliberately violated the decree of the Supreme Court of Michigan by using the restricted premises for church services, reading horoscopes, putting on a vaudeville show attended by a large gathering which purchased admission tickets and selling lunches to the gathering, which facts appear in the affidavit of Ralph Seidenbecker and are not denied by Petitioners (R. 180-183). To forestall proceedings for contempt the Petitioners again petitioned the Supreme Court of Michigan to change its decree and set aside the injunction, again claiming that the decree deprived them of their federal constitutional rights (R. 166-173). The Supreme Court of Michigan on May 18, 1950 denied the petition (184) as it had done on April 9, 1947 (165) and Petitioners now for the first time seek review in this court.

SUMMARY OF ARGUMENT

The Plaintiffs and Appellees contend that the petition for writ of certiorari should be denied because—

1. It was not timely filed and comes as an afterthought.

2. It does not present any federal question of substance.

ARGUMENT

1. The Petition for Writ of Certiorari Was Not Timely Filed and Comes as an Afterthought.

It has been shown in the Concise Statement of the Case that following the entry of the decree of the Supreme Court of Michigan on April 3, 1945, the Petitioners petitioned the Supreme Court of Michigan to grant a rehearing upon the ground among others that the decree was contrary to the same federal constitutional provisions which they rely upon in this proceeding (R. 111, 117). Upon denial of their petition by order of the Supreme Court of Michigan entered April 9, 1947 (R. 165), the Petitioners did not apply to this court for review. Under these circumstances, the Petitioners should not be permitted at this late date to reopen the case.

2. The Petition Does Not Present Any Substantial Federal Question.

It is well settled by the decisions of the Supreme Court of Michigan that building restrictions are private property of value. They cannot even be taken under the power of eminent domain without compensation. *Allen vs. City of Detroit,* 167 Mich. 464.

In *Johnstone vs. Detroit, etc., R. Co.,* 245 Mich. 66, 77, the Supreme Court of Michigan stated:

> "Other courts have designated the right created by building restrictions as a negative easement, recipro-

> cal negative easement, property right, equitable interest in the nature of, or analogous to, an easement or negative easement, and otherwise. Whatever the name, all American authorities we have been able to discover, which have attempted definite statement of the effect of building restrictions adopted in furtherance of a general plan, hold that they constitute equitable interests or property rights in each lot for the benefit of and appurtenant to each other lot covered by the same restrictions, at least when the instrument creating them evidences the purpose that they shall run with the land and not be purely personal."

The court further said at page 74 as follows:

> "Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate. This court has expressly recognized that the right of privacy for homes is a valuable right."

In *11 American Jurisprudence,* at page 1145, under the topic *Constitutional Law,* it is said:

> "The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government."

But the same Constitution which thus protects the Plaintiffs and Appellees in the enjoyment of the privacy of their homes is looked to by the Petitioners to justify an invasion of those homes under the guise of the exercise of religious freedom. It will be noted that the Petitioners in common with others purchased their property burdened

with a restriction or reciprocal covenant intended to fix and preserve the properties in the subdivision as places of private abode. Having purchased that kind of property, the Petitioners surely cannot be heard to say that enforcement of the decree will deny to them any right which is entitled to protection under the Constitution.

This court has never held and it does not seem likely that it will ever hold that freedom of religion is absolute as contended by the Petitioners. Could it be argued successfully that a newspaper establishment may operate without restraint in this subdivision merely because the Constitution guarantees freedom of the press? Or, could it be argued successfully that a house in this restricted subdivision may be turned into an auditorium or public lecture hall upon the ground that the Constitution guarantees freedom of speech and of assembly? The answer to these questions seems at once obvious. The Constitution also secures people in their right to carry on trade and commerce generally.

In *11 American Jurisprudence,* page 1147, it is said:

> "The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guaranties of the Fourteenth Amendment. It has been said that the preservation of such right is the principal purpose of the Constitution itself and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. The right is fundamental, natural, inherent, and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business, occupation, or calling is 'property' within the meaning of the Constitutional provisions as to due process of law and is also included in the right to liberty and pursuit of happiness."

Does it follow from the foregoing that this subdivision will not be granted protection against the inroads of business places? The answer seems clearly "No". The same answer must apply in the instant case where the Petitioners seek to carry on church services, vaudeville shows, public horoscope readings or other activities thought by them to have religious significance.

The contention made by the Petitioners in this proceeding is not supported by any of the cases cited in their brief. *Sipes vs. McGhee* and *Shelley vs. Kraemer* decided that the State, through its courts, could not enforce a restriction which discriminated against persons on account of their color thereby denying them the equal protection of the laws. But the restriction which is here enforced by the decree of the Supreme Court of Michigan does not discriminate against the Petitioners on account of their color, their religion, their race, their politics, their business, or in any other respect. The restriction as enforced by the decree merely means that all uses not ordinarily carried on in a place of abode should be excluded from the subdivision, whether such uses happen to involve religious activities or not, and if they do, regardless of creed or denomination. Such a restriction is not in any sense discriminatory.

The other cases cited by the Petitioners in support of their constitutional theory have to do with the upholding of religious freedom as against statutes or ordinances enacted under the police power of the State. No case has been cited which would indicate that this court has decided or is likely to decide that churches should be allowed to establish themselves in residential subdivisions contrary to private restrictive covenants. The concept of religious freedom and due process of law does not call

for such a result at the expense of those who love their homes, and it is a fallacy to argue that it does.

Religious practices and activities take many forms and cover a wide range and, according to the defendants' tenets, embrace the practice of astrology and casting horoscopes. A church is just as inconsistent with restrictive residential covenants as a hospital, library, public lecture hall, newspaper establishment, etc. The petition merely gets down to this, that the court is asked in one sweep to nullify the effect of all building and use covenants.

The Petitioners earnestly profess sincere religious convictions, and yet for some reason they seem unable to respect the rights of the people in this subdivision to enjoy the privacy of their homes. The Petitioner, Mr. Crews, is not prevented from using the property for private devotions or other activities such as would ordinarily be expected to be found in the home of a pastor. On the other hand, when it comes to carrying on practices and activities, whether religious or otherwise, which are inconsistent with the use of the property as a private home, it is not a denial of religious freedom or due process of law to require Petitioners to follow the example of other churches and carry on those activities outside of the restricted subdivision.

RELIEF

Inasmuch as the petition for writ of certiorari does not present any substantial federal question and was not timely filed, it should be denied.

Respectfully submitted,

HENRY R. BISHOP,
Attorney for Plaintiffs,
Appellees and Respondents.

Dated: October 5, 1950.